VIRGINIA:
IN THE WORKERS' COMPENSATION COMMISSION

Opinion by MARSHALL
Commissioner

Dec. 5, 2013

GLENN DOUGLAS v. INOVA HEALTH SYSTEMS
INOVA HEALTH SYSTEM, Insurance Carrier
GALLAGHER BASSETT SERVICES INC, Claim Administrator
Jurisdiction Claim No. VA00000709803
Claim Administrator File No. 005039004253WC01
Date of Injury November 30, 2012

W. David Falcon, Esquire[1]
For the Claimant.

Nirav Patel, Esquire
For the Defendants.

REVIEW on the record by Commissioner Williams, Commissioner Marshall and Commissioner Newman at Richmond, Virginia.

The claimant requests review of the Deputy Commissioner's June 26, 2013 Opinion dismissing his claim, and finding he did not meet his burden of proving a compensable injury by accident or occupational disease. We AFFIRM.

I. Material Proceedings

The claimant, a nurse, filed a claim on January 14, 2013, alleging a compensable injury by accident or occupational disease affecting both eyes on November 30, 2012. He sought temporary total disability benefits from December 1, 2012 and continuing. The parties stipulated to the claimant's pre-injury average weekly wage. The defendants asserted the claim was not

[1] Geovanni Munoz appeared on behalf of the claimant at the Deputy Commissioner's hearing on June 19, 2013, and subsequently filed the claimant's request for review and written statement in support of his review request. Upon Mr. Munoz's installation as a Deputy Commissioner of the Commission and departure from private practice, W. David Falcon filed his Notice of Appearance on September 13, 2013.

compensable as an injury by accident, occupational disease or ordinary disease of life arising out of and in the course of the claimant's employment. The defendants further asserted the injury did not occur as a result of a risk peculiar to the claimant's employment, and argued the injury was unrelated to the employment.

Deputy Commissioner Cummins conducted an evidentiary hearing on June 19, 2013 and found the claimant had not successfully carried his burden of proving a compensable injury or disease. She explained:

> The claimant works for Alexandria Hospital. While out on disability for a non-work-related shoulder/arm injury, the claimant received the November 15, 2012 letter from the employer, stating that he needed to get a flu shot (Claimant's Exhibit 2). This letter stated that all employees were required to get the shot and would be terminated if they failed to comply. The letter also stated that there was an exception for employees on leave of absence. He understood from the letter and from speaking with the health nurse office that he had to comply or he risked losing his job. He received the flu shot on November 27, 2012.
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> The claimant states that he began having eye symptoms on November 30, 2012. Specifically, he noted flashing of lights in his head, extreme light sensitivity, pain and blurred vision. He sought treatment on November 30, 2012 from Dr. Norlando Conan[a]n. He was diagnosed with optic neuropathy. He is considers himself to be legally blind. The claimant presented to the hearing with a white cane, hat and dark glasses to deal with his light sensitivity.
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> On June 11, 2013, Dr. Brain Egan reported that the claimant has visual acuity with hand motions in the right eye and 20/250 in the left eye. Dr. Egan stated:
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> > In summary, he has suffered bilateral loss of vision. After reviewing his hospital notes, it is most likely that this represents an optic neuropathy after he received the flu vaccine. It is reasonable to obtain an ERG to rule out a retinal etiology since his pupils were normal today
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> With regard to the flu vaccine he received, the claimant stated during his deposition that there was nothing unusual about the flu vaccine that he received. He was not able to make the same statement at the time of the hearing.

We find from the evidence that the claimant has failed to establish that the injury arose out of his employment, be it by injury by accident, occupational disease or ordinary disease of life. The phrase "arising out of" pertains to the origin or cause of the injury. Bradshaw v. Aronovitch, 170 Va. 329, 335, 196 S.E. 684, 686 (1938). An accident is deemed to have arisen out of the employment when there is a causal relationship between the claimant's injury and the conditions under which he performs his duties. This excludes from coverage those injuries which stem from a hazard to which the claimant would equally be exposed outside the workplace: "the causative danger must be peculiar to the work, incidental to the character of the business, and not independent of the master-servant relationship." County of Chesterfield v. Johnson, 237 Va. 180, 183-184, 376 S.E.2d 73, 74-75 (1989), citing, United Parcel Service v. Fetterman, 230 Va. 257, 258-259, 336 S.E.2d 892, 893 (1985).

So too, for an occupational disease or ordinary disease of life to be found compensable, a necessary element of proof hinges on whether the injury arose from a risk of the employment. Indeed, for an occupational disease, the claimant must first establish that the injury qualifies as a disease. Once the claimant does so, the claimant must establish that there is a direct causal relationship between the employment and the disease, that the disease was contracted as a result of exposure occasioned by the employment and can fairly be traced to the employment as the proximate cause, and that it was peculiar to the employment. Section 65.2-400, Code of Virginia.

Under the ordinary disease of life provisions of the Act, the claimant must establish by clear and convincing evidence, to a reasonable degree of medical certainty, that his injury arose out of and in the course of his employment, did not result from causes outside the employment, is characteristic of the employment and is caused by conditions peculiar to the employment. Ross Laboratories & Associated Indemnity Corp. v. Barbour, 13 Va. App. 373, 412 S.E.2d 205 (1991); Marley Mouldings, Inc. v. Rotenberry, Record No. 0755- 95-3, Court of Appeals of Virginia (April 23, 1996).

The claimant has not met his burden of proof on any of these issues. He is unable to establish that the injury arose from a risk inherent in or peculiar to his employment. The flu vaccine is something to which the general public at large is exposed. He has failed to demonstrate that there was anything unusual about the flu vaccine. Moreover, while Dr. Egan states that this most likely is optic neuropathy following the vaccine, he also suggested further testing because there might be a retinal etiology to the injury. This suggests that there may well have been a pre-existing, non-work-related etiology for the claimant's eye condition. For the reasons stated, the Claim for Benefits is denied.

(Op. 3-5.) The claimant timely appealed.

II. Findings of Fact and Rulings of Law

We incorporate by reference, and summarily adopt, the findings of fact and rulings of law made by the Deputy Commissioner. In order to prove an injury by accident, the claimant must demonstrate "(1) an identifiable incident; (2) that occurs at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily change." Hoffman v. Carter, 50 Va. App. 199, 212, 648 S.E.2d 318, 325 (2007) (citing Chesterfield County v. Dunn, 9 Va. App. 475, 476, 389 S.E.2d 180, 181 (1990)). "An injury 'arises "out of" employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury.'" Bradshaw v. Aronovitch, 170 Va. 329, 335, 196 S.E. 684, 686 (1938). Conversely, "[a]n injury not fairly traceable to the employment as the contributing proximate cause, and which comes from a hazard to which the employee would have been equally exposed otherwise, does not arise out of the employment." Id at 336, 196 S.E. at 686.

In this case, we find the claimant has not satisfactorily established his alleged injury arose out of his employment. Such a showing is a requisite element of any compensable claim, whether an injury by accident, occupational disease, or ordinary disease of life. We acknowledge the statements of Dr. Sonalee Kulkarni that "[t]his is probably a reaction to the influenza vaccine", and Dr. Brian M. Egan that "it is most likely that this represents an optic neuropathy after he received the flu vaccine." (Cl. Exh.1) While these statements could be sufficient evidence in some circumstances, the totality of the medical evidence presented is inconclusive as to causation of the claimant's symptoms, and we are not persuaded by them.

III. Conclusion

The Deputy Commissioner's June 26, 2013 Opinion is AFFIRMED.

An attorney's fee in the amount of $200.00 is awarded to W. David Falcon, Esquire, for legal services rendered the claimant, the payment of which is the responsibility of the claimant.

This matter is hereby removed from the Review docket.

APPEAL

You may appeal this decision to the Court of Appeals of Virginia by filing a Notice of Appeal with the Commission and a copy of the Notice of Appeal with the Court of Appeals of Virginia within 30 days of the date of this Opinion. You may obtain additional information concerning appeal requirements from the Clerks' Offices of the Commission and the Court of Appeals of Virginia.